

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**COMMENTS**

Main Street Broadcasting Company Incorporated (“Main Street”), by counsel, hereby submits these Comments in the above-captioned proceeding in response to the *Notice of Proposed Rule Making and Further Notice of Proposed Rulemaking*, FCC 01-329, released November 9, 2001 (hereinafter “*Notice*”).

Main Street is the licensee of FM radio station WLNG, Sag Harbor, New York. As a single station competing in a small but semi-consolidated market, Main Street has acquired a perspective on the issues presented in this proceeding that may be useful to the Commission as it decides on what changes in its current radio ownership rules may be appropriate.

**I. The Commission Should Not Rely on Arbitron’s Market Boundaries.**

The *Notice* asked whether Arbitron’s radio markets provide a reliable measure of the approximate geographic market for purchases of a competition analysis. Main Street does not agree with that proposition. *See Notice* at ¶ 44. Main Street emphatically rejects the notion that use of the Arbitron market by some advertisers in some situations makes it appropriate for FCC purposes.

The Arbitron market in which WLNG operates is the Nassau-Suffolk market. This vast area includes well over a million people who are not reached by the signals of WLNG or any of the other

stations with which WLNG competes on the East End of Long Island. Very few of Main Street's advertising clients buy time with any thought of the Arbitron market involved. In markets such as the one in which WLNG competes, advertisers only care whether a given station will reach an adequate number of prospective consumers of the desired type. Reliance on the coverage contours of the stations involved in a given transaction, essentially as is done under the current rule, is the best starting place for such an analysis.

## **II. The Current Rule Does Not Address an Anomaly of AM Propagation.**

A recent proposal for further consolidation of radio ownership in Main Street's market has focused Main Street's attention on an anomaly that should be addressed now that the Commission has the opportunity to refine its market definition rule. Main Street believes that any new rule should provide for some contour overlaps to be disregarded in peculiar circumstances. Specifically, the signals of AM stations from one market may intrude into what is realistically an altogether separate market, due only to the extremely high conductivity of a salt water path between the two areas. In such cases, these AM stations may do nothing more than penetrate the fringe of the relevant local market. Absent proof that the distant stations actually compete in the local market, their predicted coverage should not allow one operator to acquire an excessive degree of market power there.

Under a technical application of the Commission's current market definition rules, there is room for a would-be consolidator in such an area to include the distant stations in its market definition analysis under Section 73.3555(a). This would allow the consolidator to claim that the presence of sufficient "competitors" requires approval of the proposed assignment, regardless of its actual anti-competitive effects. In a case presently pending before the Commission, just such an

applicant argued that the Commission's staff is *compelled* to grant the assignment application, despite un rebutted evidence that the distant stations do not sell in the local market, and do not even have an appreciable number of listeners there.<sup>1</sup>

### **III. The Commission's Rules Should Reflect Reality.**

At a minimum, the Commission should clarify that under any new rule, or the existing market definition rule if it is retained, the agency maintains its historical practice of considering an entity's actual presence in a market for purposes of the Multiple Ownership Rules. The FCC's Rules rest on the premise that a single entity's domination of a market creates an anti-competitive environment contrary to the public interest. Evaluating monopolistic behavior is a decidedly real-world task. The Rules were designed to reflect "the actual options available to listeners and market conditions facing the particular stations in question." *Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993).

Actual competition -- a quintessentially pragmatic notion that recognizes reality rather than merely a predicted but illusory presence -- is the appropriate standard. Obviously, a would-be consolidator should not be able to achieve near monopoly status simply by arguing that certain hypothetical competitors might exist. Evidence that such competitors have, in fact, no actual influence in a specific market should therefore be considered in appropriate cases.

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<sup>1</sup> See application of AAA Entertainment Licensing, LLC (FCC File No. BAPH-20011207AAK) for acquisition of the permit for FM station WCSO, Southampton, New York; petitions to deny filed January 28, 2001 by Main Street Broadcasting Company Incorporated, Jarad Broadcasting Company of Westhampton, Inc. and Crystal Coast Communications, Inc., and responsive pleadings.

#### **IV. The Commission Historically Has Disregarded Anomalous Contour Overlaps in Order to Follow the Public Interest.**

Historically, the FCC has disregarded a *de minimis* contour overlap in evaluating compliance with the Multiple Ownership Rules. *See, e.g., KSOO-TV, Inc.*, 43 FCC.2d 879, ¶6 (1973). In addition to the salt water propagation phenomenon of greatest concern to Main Street, the Commission has disregarded contour overlap achieved over unusual distances on land due to extremely high conductivity. *See Richard R. Zaragoza, Esquire*, 6 FCC Rcd. 4655 (1991). In *Zaragoza*, the Commission ignored the contour overlap of AM stations that obviously did not compete in the same Kansas markets, where the overlap was merely a function of the extremely high soil conductivity of that region.

Going back several decades, the Commission has taken the specific aberrations created by broadcast signals crossing salt water into account. Thus, the agency has disregarded contour overlap in an analysis under the Multiple Ownership Rules where the overlap “occurred] mainly over a large body of water and adjacent, uninhabited marshlands.” *Tidewater Broadcasting Co. Inc.*, 2 FCC.2d 364, ¶4 (1966). That case involved AM signal propagation across Chesapeake Bay. The Commission reasoned that “[T]he overlap was occasioned in large measure by the substantial salt water paths of high conductivity.” The FCC concluded that the involved communities were “clearly separate and distinct” despite the overlap. *Id.*

When station coverage areas are distorted by long salt water paths, the FCC has recognized the anomalous nature of such coverage and has adjusted its public interest evaluation accordingly. For example, “high conductivity [salt water] paths” could rebut a presumption that signal

penetration of a larger community by an applicant's proposed 5 mV/m daytime contour signals an intention to serve the larger community. See *AM Station Assignment Standards*, 49 FCC 2d 1055, ¶7 (1974); *KACY, Inc.*, 15 FCC 2d 33, ¶4 (1968).

These cases serve as examples of the Commission's valid and historic practice of acting in the public interest by disregarding the aberrant effects of contour overlap occasioned by the extended salt water conductivity. However, the unusual nature of saltwater propagation was not specifically addressed in the Commission's implementation of the 1996 Act. *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, Order, 11 FCC Rcd 12368. That omission has led some to argue that the policy developed in the cases cited above was wiped out by the adoption of the current radio ownership rules. An addition to the Multiple Ownership Rules of a note clarifying that the policy of *Tidewater Broadcasting Co., Inc.*, remains in force would therefore be appropriate.

#### **V. A Strictly Technical Application of the Current Market Definition Can Yield Absurd Results.**

The following hypothetical will illustrate the need for the suggested Note. Consider a region where some of the broadcast signals of ten AM stations in one market (the "Distant Market"), penetrate the fringe of another market (the "Local Market") due to extended conductivity over a long salt water path. Assume further that the principal city contours of ten stations in the Distant Market touch a shoreline served by one or more of the stations in the Local Market. In every such region, the current market definition employed by the FCC arguably requires the Commission to grant an application proposing the acquisition by one party of every station in the Local Market. The *de minimis* contour overlap occasioned by the long salt water path in such cases creates a "market" for FCC purposes with only the *appearance* of multiple competitive participants. The technical applica-

tion of the Rules that might allow such an acquisition would actually operate to strip the Local Market of all genuine competition.

Accordingly, if one party already owned three of the four FM stations licensed to communities in a Local Market on an island like Long Island, and the signals of 11 distant AM stations from the mainland produced some marginal contour overlap on the island's beaches and as much as a mile inland, the FCC arguably could be compelled to grant an application by the Local Market's dominant broadcaster proposing acquisition of the only remaining FM station. One broadcaster could then own all of the FM stations in the market and control 100 percent of the local radio advertising revenue.

This rulemaking proceeding affords the Commission an excellent opportunity to eliminate any uncertainty on this score. That can be done by adopting the "Suggested Note" attached hereto as Exhibit 1.

**VI. Without Clarification, the Current Rules May Allow Excessive Concentration on Eastern Long Island.**

This above hypothetical is not far removed from the real-life situation in Eastern Long Island, where all the local stations are Class A FM facilities.

The market where WLNG competes approximates that portion of Long Island east of Hampton Bays. This area (which we will refer to here for convenience as the "East End") is comprised of several townships (called "towns" in New York State) lying more than 70 miles from Manhattan. Because of that distance, reception of New York City radio stations is limited at best. There is no local daily newspaper. The East End has no local full service television station. Thus, the market relies on local radio, and in particular on WLNG, for local news and information.

Main Street's WLNG has been the leading radio station in this market for decades. Its rich tradition of service to the community has been recognized by countless community organizations, and by the broadcast industry in the form of an NAB Crystal award. As part of this tradition, Main Street operates a fleet of large vehicles for remote broadcasts and other community outreach programs. This station promotes literally hundreds of community events each year. Its sales force works with local businesses throughout the East End to promote their products and services. Main Street does not, however, actively sell in Connecticut, Nassau County, or even western Suffolk County. That is because the area where it can effectively sell time is limited to the area where it provides a reliable signal (*i.e.*, 54 dBu or better).

Under the current rule, if fifteen or more stations are deemed to serve a "market," a single party may own, operate or control as many as six commercial radio broadcast stations, of which four may be within a single service (AM or FM). *See* 47 C.F.R. §73.3555(a)(1)(iii).

While Main Street operates a single, strong station in the East End, it must compete with an operator who already has four FM stations. AAA Entertainment Licensing, LLC ("AAA") owns existing FM stations WBAZ, Bridgehampton; WBEA, Southold; and WEHM, East Hampton, all of which have overlapping 70 dBu contours with WLNG. In addition, AAA owns WMOS, Montauk, New York. While WMOS serves the eastern part of the East End, its 70 dBu contour falls just outside the relevant local market as defined by reference to the signal of WCSO, Southampton, New York.

In an application currently pending before the Commission, AAA seeks to acquire the permit to construct and operate WCSO. The pending application therefore contemplates giving AAA Entertainment control of at least four, and arguably five, FM stations in a market which includes

only a very few other commercial radio stations licensed to Long Island communities. Under any market definition that accounts for reality, the addition of WCSO to this total would exceed the statutory limit on the number of FM stations that AAA may control.

AAA has argued in support of its application that the relevant market includes all radio stations whose principal community contours overlap with those of the AAA Stations. *See* 47 C.F.R. §73.3555(a)(3)(ii). Under a technical rendering of the current Rules, AAA asserts that some twenty stations serve the market, which of course would permit the operation of four stations by a single licensee. Of the twenty stations that AAA relies on to demonstrate compliance with the Rules, seven are AM stations located in New England.

The distant stations at issue are, of course, separated from the relevant local market by Long Island Sound, a gulf of from ten to fifteen miles of seawater. These distant stations actually serve the Connecticut and Rhode Island mainland. They are deemed to “serve” the market only in the sense that their signals reach the edge of the North Fork of Long Island due to the extended conductivity over this salt water path.

In contrast to the salt water conductivity of Long Island Sound, the glacial moraine soils of Long Island have the lowest ground conductivity of any part of the United States. *See* 47 C.F.R. §73.190 at Figure R-3 (formerly map M-3). Consequently, signals expressed across the Sound by salt water soon come to a halt when they hit land, rather like a skater who strays from ice to concrete.

In such a situation, it is not realistic to include such stations in the set of stations deemed to compete in the local market. These facts demonstrate that a modest refinement of the current rule would be sufficient to avoid undue concentration of an unusual market like the East End.



**VII. Predicted Coverage Should Establish Only a Rebuttable Presumption of Actual Presence in a Market.**

If the Commission does not adopt a Note of the kind suggested here, at a minimum it should confirm that the “actual presence” in the market ought to be the appropriate test in determining whether the standards in the market referenced in the 1996 Act have been satisfied. To the extent that predicted overlap implies actual presence, it merely should be viewed as merely establishing a rebuttable presumption.

With respect to the pending application for AAA’s acquisition of WCSO, Main Street provided evidence that the New England stations do not compete in the East End and have essentially no share of local advertising revenue. Sworn declarations from WLNG management, all of whom are intimately familiar with the market, supported these factual allegations. This kind of evidence ought to overcome any presumption of actual presence arising from predicted contour overlap, particularly when such overlap is solely the function of a salt water path.

Accordingly, without a specific Note to address the problem identified in these Comments, any market definition adopted by the Commission ought to be in the form of a rebuttable presumption. Certain criteria, such as appropriately-supported allegations of revenue shares, should be available as recourse for those who would rebut the presumption.

**VIII. CONCLUSION**

The Commission should retain its present market definition standard, but should add to the current rule a Note clarifying that contour overlap occasioned solely by propagation over salt water should generally be disregarded. Alternatively, if the Commission adopts the suggested Note, it should affirm that any market definition formula merely establishes a *rebuttable* presumption of

actual presence in a market, which could be overcome by evidence that a given station does or does not actually compete in the market served by the stations at issue.

Respectfully submitted,

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Dated: March 27, 2002

## **EXHIBIT 1**

### **SUGGESTED NOTE TO 47 C.F.R. §73.3555**

NOTE 11 to §73.3555: In applying the provisions of this Section, the Commission shall disregard the predicted presence of an AM radio station in a given market if that station's principal community contour penetrates the market due solely to propagation over salt water, absent persuasive evidence that the station competes in the market.

**CERTIFICATE OF SERVICE**

I, Stuart W. Nolan, Jr., hereby certify that on this date I caused the foregoing "Comments" to be served by first class mail, postage prepaid, on the following:

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